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No. 91-1729

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

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UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners

v.

STATE OF TEXAS AND
TEXAS DEPARTMENT OF HUMAN SERVICES,
Respondents

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

****

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

Whether the Debt Collection Act abrogated prior common law permitting awards of prejudgment interest against the States.

Whether the Secretary of Agriculture's unilateral imposition of liability on a State for direct mail delivery losses under the Food Stamp Act is a contractual debt subject to prejudgment interest, or a penalty and not subject to prejudgment interest.

Whether awarding prejudgment interest against the State of Texas would violate the principles of *Pennhurst State School & Hospital v. Halderman*, where the Food Stamp Act does not provide for prejudgment interest on discretionary penalties awarded against a State, and the Debt Collection Act expressly exempts the States from prejudgment interest.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Debt Collection Act of 1982, Pub. L. No. 97-365, § 11, 96 Stat. 1755-1756, as amended, 31 U.S.C. §§ 3701(c), 3714, 3716, and 3717, pertinent provisions of the Food Stamp Program, 7 U.S.C. § 2016(f), and the regulations promulgated thereunder, 7 C.F.R. §§ 276.1 and 276.2, are reproduced in the Appendix, *infra*.

STATEMENT OF THE CASE

Respondents accept in general the factual description presented by Petitioners, with the following addendum concerning the Food Stamp Program, 7 U.S.C. §§ 2011 *et seq.* The Food Stamp Program is a program administered jointly by the Federal and State Governments in which state agencies (in Texas, the Texas Department of Human Services) make

eligibility determinations and authorize low-income households to obtain food stamp coupons. The coupons themselves are obligations of the Federal Government and are redeemable at face value by providers. The coupons are delivered to the State agency by the United States Department of Agriculture. The Act provides that liability may be imposed upon the State by the Secretary for failure by the State to properly execute the administrative functions associated with eligibility determinations and distribution of coupons. In most cases such liability is contingent upon a finding by the Secretary that the State was negligent or otherwise at fault. 7 U.S.C. § 2020(h). The statute has, however, long held States strictly liable for the "acceptance, storage and issuance" of the food stamp coupons. However, the original law provided that if the coupons were distributed to households through the U. S. Mail, the State's liability ended once the coupons were put into possession of the United States Postal Service. Accordingly, States adopted strict security measures with respect to the storage and transportation of the coupons while the coupons were in the custody and control of the State or its agents. None of the losses which resulted in State liability being challenged in this case resulted from losses which occurred while the coupons were in the custody and control of the State or any of its agents.

In 1981, the Food Stamp Act was amended permitting the Secretary to make States liable to some degree for mail issuance losses. 7 U.S.C. § 2016(f). The regulatory scheme adopted by the Secretary recognized that mail issuance losses were an exception to the strict liability applicable to other issuance activities. Nevertheless, the Secretary unilaterally established a "tolerance level" for losses above which States would be held strictly liable without regard to any fault on the part of the State or its agents, nor would the State be permitted to demonstrate fault on the part of any third party. 7 C.F.R. § 276.2(b)(2)(4).

Understandably, following the adoption of interim rules on this subject, many States took issue with various aspects of the Secretary's regulations and recommended that State agencies not be held accountable for mail issuance losses

directly related to Postal Service operations. 48 Fed. Reg. 15225. On April 9, 1986, the Department of Agriculture published proposed rules in which the Secretary clearly and unambiguously indicated that the Food and Nutrition Service would adjust claims for mail issuance losses where such relief was warranted. The criteria for determining when such relief would be warranted specifically made reference to a situation in which the State continued to issue food stamp coupons through the mail in order to aid an investigation by the U.S. Postal Service or other law enforcement agencies into heavy mail issuance losses. See 51 Fed. Reg. 12268, at 12275.

SUMMARY OF ARGUMENT

The Debt Collection Act of 1982, 31 U.S.C. § 3701 *et seq.*, was enacted by Congress to improve the collection of debts owed the federal government. Section 3701(c) of the act expressly exempted the States from the imposition of prejudgment interest under the act on debts owed to the federal government. Prior federal common law permitted the federal government to assess such interest against the States. In the Debt Collection Act, however, Congress went beyond merely omitting a remedy for a class of individuals or entities subject to the statute; it expressly removed the remedy. The plain reading of the statute evinces Congressional intent to shield the States from prejudgment interest. Exempting the States from prejudgment interest (§ 3717) and administrative offsets § 3716) does not contravene the stated purposes of the act, and represents a reasonable balancing of interests by the Congress. Finally, subsequent amendments to the Food Stamp Act demonstrate that Congress purposefully retained the flexibility to impose prejudgment interest in those situations it felt most appropriate, and that it knew how to impose such interest.

Deference to prior federal common law is misplaced in this setting. Congress has spoken to the issue at bar; to require the degree of specificity sought by the Petitioners would mandate that Congress affirmatively proscribe any and all common law doctrines. Deference to federal common law does

not surmount statutory Congressional intent to the contrary. Deference to federal common law is weaker than the deference owed substantive state common law. Doctrines against the implied abrogation of common law are of limited relevance in this case. Finally, merely because some federal agencies have made interpretations of § 3701(c) and its possible abrogation of federal common law does not mean that federal courts must defer to and adopt mistaken interpretations.

The Secretary's imposition of unilateral and unreviewable sanctions for losses under the Food Stamp Program are penalties, not contractual debts. As penalties, prejudgment interest is inappropriate. There is no improper use of federal monies, the time value of which must be disgorged from the States and returned to the federal government. The losses that resulted in the penalty were the result of theft by third parties in the U.S. Postal Service.

The imposition of prejudgment interest for unilateral penalties assessed by the Secretary violates the principles of *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981). The Food Stamp Act was silent on the issue of prejudgment interest, so the State of Texas could hardly have bargained for this measure. Because the Debt Collection Act abrogated prior federal common law, this implied remedy in unavailable. The original penalty is a punitive measure, and hence prejudgment interest is not necessary to provide the federal government with full compensation.

ARGUMENT

I. THE DEBT COLLECTION ACT ABROGATED ANY PRIOR FEDERAL COMMON LAW PERMITTING AWARDS OF PREJUDGMENT INTEREST AGAINST THE STATES.

Prior to the judgment of the District Court, the Food Stamp Act, 7 U.S.C. § 2001 *et seq.*, was silent as to the imposition of prejudgment interest on claims against the States.[1] The Debt Collection Act, 31 U.S.C. §3701 *et seq.*, however, expressly exempts the States from its provision imposing prejudgment interest on claims owed the Federal Government. Section 3716 of the Debt Collection Act provides for administrative offsets as a method of collecting claims owed the United States. Respondents' Appendix. Section 3717 provides for interest and penalties on debts owed the United States. Respondents' Appendix. Section 3701(c) provides:

> In sections 3716 and 3717 of this title, 'person' does not include an agency of the United States Government, of a State government, or of a unit of general local government.

The Secretary of Agriculture maintains that the United States Department of Agriculture (USDA) is permitted nonetheless to impose prejudgment interest on the State of Texas pursuant to federal common law. See *West Virginia v. United States*, 479 U.S. 305, 107 S.Ct. 702 (1987). In particular, the Secretary maintains that the enactment of § 3701(c), which expressly exempts the States from prejudgment interest, did not expressly *prohibit* the imposition of prejudgment interest on the States, and therefore § 3701(c) did not abrogate prior federal common law permitting such interest.

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[1] Section 2022 was amended in November of 1990, subsequent to the judgment in the District Court, expressly providing for prejudgment interest for claims brought under the quality control provisions of § 2025 of the Food Stamp Act.

In contrast, Respondents agree with the Court of Appeals for the Fifth Circuit that Congress had addressed this issue when it expressly exempted the states from prejudgment interest, and thus abrogated the federal common law. Congress does not have to expressly and affirmatively act in order to abrogate *federal* common law. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 315, 101 S.Ct. 1784, 1791 (1981).

The primary focus of this dispute, then, is the correct interpretation of § 3701(c) of the Debt Collection Act. The Fifth Circuit held that the intent of Congress was to exempt the States from prejudgment interest unless expressly authorized by statute. *State of Texas*, 951 F.2d at 651. *See also*, *Perales v. United States*, 751 F.2d 95 (2nd Cir. 1984) (per curiam), *affirming*, 598 F.Supp. 19 (S.D.N.Y. 1984); *Penn. Dept. of Public Welfare v. United States*, 781 F.2d 334 (3rd Cir. 1986); *Arkansas by Scott v. Block*, 825 F.2d 1254 (8th Cir. 1987). The Secretary maintains that this express statutory exemption from prejudgment interest does not equate with an abrogation of the common law permitting prejudgment interest, that prohibiting the States from prejudgment interest is contrary to the purposes of the Debt Collection Act, and that finding an implied abrogation of common law is improper. *Citing Gallegos v. Lyng*, 891 F.2d 95 (10th Cir. 1989); *County of St. Clair v. United States Dept. of Labor*, 754 F.2d 375 (6th Cir. 1984) (Table).

As a matter of statutory construction, the Secretary's position is extreme. Furthermore, the Secretary relies too heavily on the "brooding omnipresence" of federal common law. Neither can outweigh the clear expression of Congressional intent to exempt the States from prejudgment interest.

A. Statutory construction of an express statutory exemption from prejudgment interest evidences Congressional intent to prohibit imposition of prejudgment interest.

Any analysis of statutory construction necessarily begins with the language of the statute. *Bread Pol. Action Committee v. Fed. Elect. Comm.*, 455 U.S. 577, 580, 102 S.Ct. 1235, 1237-38 (1982). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.*, quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980). There is no dispute among the parties that the language of § 3701(c) of the Debt Collection Act exempts the agencies of the Federal Government, the States, and units of local government from the provisions of § 3716 (administrative offset) and § 3717 (interest and penalty on claims).

The Secretary maintains, however, that merely exempting the States from the provision providing for the imposition of mandatory prejudgment interest does not mean that Congress meant to exempt the States from the remedy of discretionary common law prejudgment interest. In other words, Petitioners argue that an express exemption from a statutory provision providing for a mandatory remedy is not a clear indicator of Congressional intent to preclude the discretionary imposition of the same remedy pursuant to federal common law.[2]

In *United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668 (1988), this Court addressed a similar effort at statutory interpretation regarding the Civil Service Reform Act of 1978.[3] In *Fausto* the Court decided whether the statutory omission of judicial review as a remedy for a class of employees was meant

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[2] The Secretary, as well as the Tenth Circuit in *Gallegos v. Lyng*, 891 F.2d at 797, also rely on this Court's reservation of the issue at bar in *West Virginia v. United States*, 479 U.S. 305, 312 n.6, 107 S.Ct. 702, 707 n.6 (1987), for the proposition that the issue of statutory construction is not clear.

[3] Pub.L. 95-454, 92 Stat. 111 et seq., codified, as amended, in various sections of 5 U.S.C. (1982 ed. and Supp. IV).

to preclude a similar remedy that existed pursuant to prior federal statutory and common law.

> The question we face is whether that withholding of remedy was meant to preclude judicial review for those employees, or rather merely to leave them free to pursue the remedies that had been available before enactment of the CSRA. The answer is to be found by examining the purpose of the CSRA, the entirety of its text, and the structure of review that it establishes.

Id. at 443-44, 108 S.Ct. at 672, citing *Lindahl v. OPM*, 470 U.S. 768, 779, 105 S.Ct. 1620, 1627 (1985), and *Block v. Community Nutrition Institute*, 467 U.S. 340, 345, 104 S.Ct. 2450, 2453-54 (1984).

There can be little doubt that the purpose of the Debt Collection Act is to improve the claim collection efforts of the Federal Government. "The major purpose of this legislation is to facilitate substantially improved collection procedures in the federal government." S. Rep. No. 97-378, 97th Cong., 2nd Sess. 4, *reprinted in* 1982 U.S. Code Cong. & Admin. News, 3377-78. In contrast, there is little legislative history evidencing Congress' intent in passing § 3701(c), exempting the States from the prejudgment provisions of the Debt Collection Act. *West Virginia*, 479 U.S. at 312 n.6, 107 S.Ct. at 707 n.6; *State of Texas*, 951 F.2d at 650.

In drafting the Debt Collection Act, Congress created statutory provisions that it believed would address the perceived problems facing the Federal Government by:

> (1) referring delinquent debtors to credit bureaus while providing those debtors the same protections now afforded the private sector under the Fair Credit Reporting Act, (2) requiring individuals to supply their social security number when applying for credit or financial assistance which would result in indebtedness to the government, (3) offsetting a federal employee's salary and certain benefits to satisfy general debts owed the government, (4) making it a federal penalty to assault federal employees collecting debts owed the government, (5) determining delinquent tax liability and seeking its resolution before extending federal credit, (6) disclosing mailing addresses obtained from the Internal Revenue Service on delinquent debtors to private contractors for debt collection purposes, (7) clarifying that administrative setoff of delinquent debts the government exists beyond the six-year statute of limitations, (8) assessing interest on debts owed the government and penalties on those debts that are delinquent, (9) easing the requirements for serving summonses in order to litigate delinquent debt cases, (10) reporting to Congress on debt collection activities, and (12) allowing federal departments and agencies to contract with private collections agencies for collection services.

Senate Report 97-378, at 3377-78. Even a casual review of these remedial measures indicates that Congress was primarily interested in addressing private delinquent debtors, not state delinquent debtors.

The Secretary argues, however, that exempting prejudgment interest for the States creates a perverse incentive with regard to the overall Congressional purpose of the Debt Collection Act. Petitioners' Brief at 22-28. While it seems clear that the overall purpose of the Act is the improvement of the collection of claims owed to the federal government, there are several reasons why the express exemption for the States from §§ 3716 and 3717 contained in § 3701(c) does not create perverse incentives.

First, the legislative history is silent with regard to Congress' perception of and intent to solve claim collection

problems *with the States*;[4] the clear focus of Congress was on private debtors, not the States. *E.g.*, Senate Report 97-378 at 3379 ("The $25 billion in delinquencies consists of $13.2 billion in unpaid taxes, $7.7 billion in overdue loans, and the remainder for overdue interest and overpayments to program beneficiaries."). The Secretary points to language in Senate Report 97-378 that mentions state and local governments as among those owing $126 billion to the Federal Government, in an effort to place State debtors squarely in the forefront of Congressional intent. Petitioners' Brief at 25. This $126 billion figure, however, merely refers to total indebtedness, not delinquent debt. Nowhere in Senate Report 97-378 is there an express statement that the States are a significant component of the delinquent debtor problem Congress was attempting to resolve through passage of the Debt Collection Act of 1982. Absent the perception of a serious delinquency problem at the state level, it is not perverse that Congress would exempt the sovereign States from two of the harsher collection measures of the Act, the administrative setoffs of § 3716 and the imposition of prejudgment interest under § 3717.

Second, the imposition of strict liability on the States for direct mail delivery losses in the U.S. Postal Service over tolerance levels set by the Secretary was the result of unilateral action by the Secretary. The waiver of this strict liability is completely discretionary with the Secretary. The statute further provides that the States must resort first to administrative appeals of this discretionary action by the Secretary. There is no effective final judicial review of these discretionary acts by the Secretary. *State of Texas*, 951 F.2d at 648-49. To impose prejudgment interest on the States for the time period spent waiting for a final administrative determination can be highly inequitable; delays in any final decision are just as likely to arise from the adversarial efforts of the USDA as from a State, and delays may also arise independently from within the administrative review process. Prejudgment interest would

[4] Section 3701(c) also exempts federal agencies and local government units. There is no legislative history indicating any perceived problem in collecting debts from any of these governmental entities.

operate as a disincentive for states to exercise their rights to administrative review. Congress could well have determined that imposing prejudgment interest against the States was not equitable under these circumstances.

Third, many federal agencies have program offsets available to them to collect a claim against a State. The Debt Collection Act itself evidences such a provision, § 3714, that expressly provides for offsets against the States under certain circumstances.[5] Nonetheless, Petitioners argues that because some statutes do not provide for setoff authority,[6] this remedy would not be available universally in the absence of the ability to impose prejudgment interest. The important point concerning administrative offsets, however, is that they are an option Congress knows it has available to utilize when it deems appropriate.

Finally, the case at bar does not involve a misuse of government funds in violation of statutory purpose. *E.g.*, *Bell v. New Jersey*, 461 U.S. 773, 103 S.Ct. 2187 (1983); *Riles v. Bennett*, 831 F.2d 875 (9th Cir. 1987) (per curiam), *cert. denied*, 485 U.S. 988 (1988). In those latter cases federal monies are indeed misallocated, and hence the time value of money is a necessary element of full compensation. *West Virginia*, 479 U.S. at 311, 107 S.Ct. at 706; *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654-55, 103 S.Ct. 2058, 2062-63 (1983). In contrast, the action by the Secretary makes Texas liable for losses due to third party actions that were not adequately curtailed by state *and* federal law enforcement. Texas did not spend federal monies outside program parameters, and hence prejudgment interest is not necessary to make the federal government whole. There are no "fruits of the infringement" that need to be "disgorged" from Texas, and no windfalls have been granted. *Devex Corp.*, 461 U.S. at 654-55,

[5] Congress exempted the States from the general administrative setoff provisions in § 3716. Yet in § 3714 there is an express provision for setoffs against the States in the case of State default on stocks or bonds issued by the State and held in trust by the Federal Government.

[6] The Food Stamp Act does provide for administrative offsets. 7 U.S.C.A. §§ 2016(f), 2022(a).

103 S.Ct. at 2062. Because prejudgment interest would not make the federal government whole, it is not perverse for Congress to have exempted them from this penalty.

In sum, it is hardly perverse for Congress to draft a statute enhancing the ability of the Federal Government to collect on delinquent debts, and therein avoid subjecting the States to two of the harsher measures aimed at private delinquent debtors.

It is, in fact, the Secretary's interpretation that is more circuitous and strained. In essence Petitioners argues that the intent of Congress was to establish an elaborate debt collection regimen that includes the imposition of prejudgment interest, then to exempt expressly the States from several of these provisions in order that the States be exposed silently to basically the same liability of prejudgment interest pursuant to prior common law. Such an interpretation defies the plain meaning of the statute and is an ambiguous and devious *post hoc* imposition of a program liability on the States. See also *United States v. Fausto*, 484 U.S. at 445-48, 108 S.Ct. at 672-74; *Block v. Community Nutrition Institute*, 467 U.S. at 345, 104 S.Ct. at 2453-54; *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 472-75, 79 S.Ct. 904, 909-11 (1959).

Section 3717(g)(1) of the Debt Collection Act is further evidence that Congress meant to exercise its authority in determinations of whether prejudgment interest is merited for claims against the States. Section 3717(g)(1) provides that § 3717 does not apply "if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges...." Petitioners are correct that, pursuant to § 3701(c), § 3717(g)(1) does not apply to claims against the States. However, the relevance of § 3717(g)(1) is that this section is yet another indication of the intent of Congress to permit itself to determine those circumstances where the imposition of prejudgment interest would be appropriate.[7] It is another

[7] This is in fact the *post hoc* explanation of § 3701(c) given by the amendment's sponsor, Senator Percy. See *State of Texas*, 951 F.2d at 649-50. See also Senate Report No. 97-378 at 3393. ("These provisions will generate an incentive for the debtor to pay while protecting the debtor and the social objective of the government programs by allowing flexibility in the assessment of the interest and penalty charges.").

indication that Congress has addressed the issue of prejudgment interest directly, and that it desires to balance the interests and equities involved as it sees fit.

Moreover, Congress has on several occasions expressly imposed prejudgment interest on the States, such as in the Medicaid Act, 42 U.S.C. § 1396b(d)(5), and in the Social Security Act, 42 U.S.C. § 418(j). Subsequent to the decision of the District Court in the case at bar, Congress amended the Food Stamp Act itself, effective November 1990, to expressly provide for prejudgment interest for violations of the quality control provisions of § 2025.[8] The most natural reading of this new provision is that it is a limited and express imposition of a new liability, rather than a redundant codification of common law. In other words, Congress knows how to impose prejudgment interest if it wants to.

The exemption of the States from the prejudgment interest provision in the comprehensive federal claim collection statute is clear. Given that Congress has addressed the issue, it is inappropriate for federal district courts to "supplement" the statute with remedies Congress expressly exempted. Moreover, the exemption is not perverse, and in fact is a quite plausible result of the typical balancing of interests that properly occurs in Congress.

B. The Debt Collection Act abrogated prior federal common law permitting the imposition of prejudgment interest against the States.

The Secretary argues that the statutory exemption contained in § 3701(c) did not directly and affirmatively prohibit the imposition of basically the same remedy under federal common law, that deference is due to common law remedies, and that implied repeals of common law remedies are not favored. What seems obvious, though, is that § 3701(c) signals

[8] 7 U.S.C. § 2022.

Congressional intent to exempt the States from at least one incarnation of prejudgment interest. Moreover, the Secretary mistakes the deference due state common law with the much more limited role of federal common law, improperly requires Congress to affirmatively proscribe prior federal common law, and unduly expands the judicial maxim disfavoring implied repeals of common law.

Federal courts are not general common law courts. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313, 101 S.Ct. 1784, 1790 (1981); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822 (1938). This Court has nonetheless recognized limited circumstances in which federal courts have limited authority to formulate federal common law. *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 640, 101 S.Ct. 2061, 2067 (1981). These circumstances include situations where a "federal rule of decision is 'necessary to protect uniquely federal interests,'" *Id.*, quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426, 84 S.Ct. 923, 939 (1964), situations where Congress has delegated to the courts the authority to develop substantive law, *Texas Industries*, at 640, 101 S.Ct. at 2067, citing *Wheeldin v. Wheeler*, 373 U.S. 647, 652, 83 S.Ct. 1441, 1445 (1963), and situations in which the federal courts are called upon to fill in the interstices or gaps in federal statutes. *E.g.*, *Kamen v. Kemper Financial Services, Inc.*, __ U.S. __, 111 S.Ct. 1711, 1717 (1991).

The federal common law rules governing the imposition of prejudgment interest prior to the enactment of the Debt Collection Act were discussed by this Court in *West Virginia*, *supra*, and *Rodgers v. United States*, 332 U.S. 371, 68 S.Ct. 5 (1947). Under federal common law, prejudgment interest was granted or denied by a federal district court by looking to the Congressional purposes behind the obligation, "in the light of general principles deemed relevant by the Court." *Id.* at 373, 68 S.Ct. at 7. In *West Virginia* this Court expressly reserved judgment on whether the Debt Collection Act abrogated the common law regarding prejudgment interest remedies against the States. *Id.* at 312 n. 6, 107 S.Ct. at 707 n.6. The refusal to

reach an analysis that would only be *dictum* in a case brought under a contract that predated the Debt Collection Act does not mandate the conclusion, as Petitioners suggest, that the plain meaning of the statute is less than clear.

The Secretary, given this background of federal common law permitting the imposition of prejudgment interest, argues that the claimed ambiguity of § 3701(c) and § 3717 of the Debt Collection Act requires that the statute "be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." Petitioners' Brief at 9, quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 1014 (1952). Respondents maintain, however, that the intent of Congress was to the contrary, and that any deference proper in the federal courts is due state common law, not federal common law.

As discussed *supra*, the plain meaning of § 3701(c) prohibits an assessment of prejudgment interest on the States. "The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious intended legislative purpose or lessen the scope plainly intended to be given to the measure." *Isbrandtsen Co. v. Johnson*, 343 U.S. at 783, 72 S.Ct. at 1015, quoting *Jamison v. Encarnacion*, 281 U.S. 635, 640, 50 S.Ct. 440, 442 (1930). See also *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. at 97, 101 S.Ct. at 1583 ("In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.")

The issue of whether a statute has abrogated or preempted the common law is a question of whether Congress "spoke directly to a question." *City of Milwaukee*, at 315, 101 S.Ct. at 1791. But, contrary to the claims of Petitioners, an abrogation of federal common law does not require that "Congress had affirmatively proscribed the use of federal common law." *City of Milwaukee*, at 315, 101 S.Ct. at 1791.

"Federal common law is a 'necessary expedient,'...and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.*, at 314, 101 S.Ct. at 1791.

Petitioners argue that, because Congress did not speak to the precise issue of *preclusion* of the remedy of prejudgment interest when it exempted the States from this remedy under the Debt Collection Act, Congress had not "spoken directly to the issue," and the federal courts were free to "fil[l] a gap left by Congress' silence." Petitioners' Brief at 15-16, quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 2015 (1978). Rather than refraining to impose a judicial common law remedy on sovereign States only when "Congress has failed expressly *or impliedly* to evince *any* intention on the issue," *Astoria Federal Sav. & Loan Ass'n v. Solimino*, 111 S.Ct. 2166, 2170 (1991) (emphasis added), the Secretary insists on strictly construing § 3701(c) and requiring Congress to "affirmatively proscribe" the availability of a federal common law remedy. See *U.S. v. Fausto*, 484 U.S. at 454-55, 108 S.Ct. at 677 (rejecting "a rule akin to the doctrine that statutes in derogation of the common law will be strictly construed").

In interpreting the Death on the High Seas Act,[9] for example, this Court stated that although the Act "does not address every issue of wrongful death law,...when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. at 625, 98 S.Ct. at 2015. To supplement the Debt Collection Act with the imposition of an identical federal common law remedy, even if it is discretionary, surely makes the statutory exemption meaningless. Congress "spoke directly to a question" of prejudgment interest against the States, and exempted the States. The Secretary has provided no evidence or argument suggesting that the express exemption of the States from the provisions of §§ 3716 and 3717, indicates Congressional concern for the encouragement and preservation of

[9] 46 U.S.C.A. §§ 761-67.

"supplemental remedies." *Mobil Oil*, 436 U.S. at 625, 98 S.Ct. at 2015; *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 397-98, 90 S.Ct. 1772, 1785 (1970).

The Secretary also argues that deference is due to common law remedies, and that implied repeals of common law remedies are not favored. These cases are not federal common law cases, such as the case at bar; instead, these cases concern either state common law, *Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 106 S.Ct. 755 (1986), or substantive law that has been historically delegated to the federal courts for its full development. *E.g.*, *Moragne v. States Marine Lines, Inc.*, *supra*; *Mobil Oil Corp. v. Higginbotham*, *supra*.

This Court has observed that deference is more appropriate when a federal statute is in possible derogation of *state* common law rather than *federal* common law. *City of Milwaukee*, at 316, 101 S.Ct. at 1792 (citing the importance of federalism and the "historic police powers of the States").

> Such concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required. Indeed, as noted, in cases such as the present, 'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.

Id., at 316-17, 101 S.Ct. at 1792. The common law at issue in the case at bar is neither maritime law, nor state common law; it is federal common law creating a remedy that was considered and rejected by Congress.

The Petitioners cite *Isbrandtsen Co. v. Johnson* for support for the proposition that implied repeals of long-standing common law doctrines are not favored. Petitioners' Brief at 9, 15. *Isbrandtsen* is a case wherein the continued vitality of prior maritime common law permitting employers to setoff certain

expenses against the wages of seamen was questioned due to the enactment by the Congress of Shipping Commissioners Act of 1872. This Court held that, even though Congress had not expressly precluded shippers from utilizing the setoff remedy available to them under prior common law, by listing all the setoffs or deductions an employer could use under the act, the prior common law setoff remedy was "preempted." *Id.* at 738, 72 S.Ct. at 1017. "Congress, in effect, has excluded all [other remedies] except those which it has listed affirmatively." *Id.* at 739, 72 S.Ct. at 1017. In the case at bar, Congress has not only enumerated those remedies available to the Federal Government, it has expressly exempted the States from two of them. *Isbrandtsen* can be of no assistance to Petitioners.

Nor does *Mobil Oil Corp. v. Higginbotham* offer support for the Secretary's position. In *Mobil Oil*, this Court addressed the relationship between the intent and remedies of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*, and the available state law remedies for wrongful death occurring within territorial waters. The Death on the High Seas Act excluded all remedies for almost all claims within the territorial waters. *Id.* at 620-22 & n.11, 98 S.Ct. at 2012 & n.11. At issue was whether the federal courts could supplement the remedies provided by Congress for deaths outside territorial waters. The Supreme Court in *Mobil Oil* held that Congress had enumerated the remedies for deaths on the high seas, and that supplementation was precluded. *Id.* at 625, 98 S.Ct. at 2015. The Court distinguished the holding in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772 (1970), by noting that *Moragne* involved a case wherein the federal courts were supplementing an area of law where the federal statute had delegated most regulation to state law. Moreover, the Court had concluded "that Congress withheld a statutory remedy in coastal waters in order to encourage and preserve supplemental remedies." *Mobil Oil*, at 625, 98 S.Ct. 2015, citing *Moragne*, 398 U.S. at 397-98, 90 S.Ct. 1785-86. The *Mobil Oil* Court

rejected the effort to implant a common law remedy on a statutory regimen.

Nowhere in the Debt Collection Act, or in the legislative history, is there any hint that Congress meant to encourage the supplementation of the Act by resort to other areas of law. Nor has Congress historically delegated the area of revenue recovery and debt collection to the federal courts for the development of rules of decision. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil*, at 625, 98 S.Ct. at 2015.

Federal common law is not a "brooding omnipresence in the sky," requiring obeisance and deference and strict construction of federal statutes. *c.f. Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222, 37 S.Ct. 524, 531 (1917) (J. Holmes, dissenting). Petitioners have not come forward with any colorable evidence of Congressional intent to retain either specific federal common law doctrines or of an intent to encourage "supplementation" of its statutory remedies. Nor can Petitioners rely on the out-of-context doctrine disfavoring the implied repeal of common law rules. Section 3701(c) of the Debt Collection Act removed the remedy of prejudgment interest from those available to the Federal Government in collecting debts from the States.

C. Deference to federal agencies in their interpretations of § 3701(c) of the Debt Collection Act is required only where the agency interpretation is a reasonable one.

Petitioners cite to several interpretations of the Debt Collection Act by the General Accounting Office (GAO) and the Department of Justice (DOJ) that support its contention that the Debt Collection Act permits the imposition of prejudgment interest on the States. Petitioners' Brief at 20-22. Upon examination, the Fifth Circuit found these legal opinions of the

GAO and the DOJ to be unpersuasive and lacking precedent. *State of Texas*, 951 F.2d at 651. Petitioners, however, argue that the Court of Appeals was wrong because it failed to accord the proper deference to the statutory interpretation of the agencies charged with applying the Act. Because this principle applies more appropriately to interpretations of policy issues and not of questions of law, the Fifth Circuit was correct in not deferring to the agencies' construction of § 3701(c) and the intent of Congress.

Federal courts are charged with both the authority and the responsibility to correct errors in law made by federal agencies. *SEC v. Chenery Corp.*, 318 U.S. 80, 94, 63 S.Ct. 454, 462 (1943); *Florida Dept. of Labor v. U.S. Dept. of Labor*, 893 F.2d 1319, 1321-22 (11th Cir. 1990). Judicial deference to agency statutory interpretations is, as the Secretary acknowledges, required only where the interpretation is a reasonable one. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2782-83 (1984); Petitioners' Brief at pp. 12-13. Nevertheless, "[i]f the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*, at 842-43, 104 S.Ct. at 2781. Since Congress expressly exempted the States from prejudgment interest and did intend to abrogate the common law, the Court of Appeals was not required to adopt an agency interpretation that it found unreasonable. See *Commonwealth of Penn. Dept of Public Welfare* v. United States, 781 F.2d 334, 342 ("Because the Act's language is clear, we will not defer to the administrators who construe it differently."). The federal courts are not required to "allow misconceptions in law that arise during the agency decision-making process to go unchecked," *Florida Dept. of Labor*, 893 F.2d at 1322, nor remand for further agency determinations where the evidence shows that further agency deliberation would be futile. *Id.*, at 1324.

II. THE SECRETARY'S UNILATERAL IMPOSITION OF LIABILITY ON A STATE FOR DELIVERY LOSSES UNDER THE FOOD STAMP ACT IS NOT A CONTRACTUAL DEBT SUBJECT TO PREJUDGMENT INTEREST, BUT RATHER A PENALTY NOT SUBJECT TO PREJUDGMENT INTEREST.

The obligation of Texas to pay money to the United States is a result of a unilateral decision by the Secretary of Agriculture. The decision to impose strict liability for direct mail delivery losses above an arbitrary "tolerance level" in the U.S. Postal Service was unilateral and a complete reversal of prior law. *State of Texas v. United States*, 951 F.2d 645, 648-49 (5th Cir. 1992); *Gallegos v. Lyng*, 891 F.2d 788, 789 (10th Cir. 1992). There were no arm's length negotiations between the Secretary and the States. The imposition of the obligation to pay was purely discretionary with the Secretary and, as the court below held, is not subject to judicial review. If the obligation were a debt created by a contractual arrangement, judicial review of disputes arising from that contractual relationship would be required. Moreover, the imposition of strict liability for delivery losses over the tolerance level for use of the U.S. Postal Service was opposed by many States, including Texas. 51 Federal Register 12268. This liability operates as a penalty for losses due to the actions of third parties; it is punitive and meant to force the States to adopt alternate and much more costly distribution schemes for the delivery of food stamps, and is not an effort to disgorge monies illegally diverted from the Food Stamp Act.

Accordingly, the "debt" on which the United States seeks to collect interest, pursuant to federal common law, is not a debt created by some contractual agreement requiring prejudgment interest for full and complete compensation for that debt. *See West Virginia*, 479 U.S. 305, 107 S.Ct. 702 (1987). Rather, it is a penalty, and as such is not subject to

prejudgment interest. *Rodgers v. United States*, 332 U.S. 371, 374-76, 68 S.Ct. 5, 7-8 (1947).[10]

III. BECAUSE THE FOOD STAMP ACT DOES NOT PROVIDE FOR PREJUDGMENT INTEREST ON DISCRETIONARY PENALTIES AWARDED AGAINST A STATE, AND THE DEBT COLLECTION ACT EXPRESSLY EXEMPTS THE STATES FROM PREJUDGMENT INTEREST, AWARDING PREJUDGMENT INTEREST AGAINST THE STATE OF TEXAS WOULD VIOLATE THE PRINCIPLES OF *PENNHURST STATE SCHOOL & HOSPITAL V. HALDERMAN.*

The Fifth Circuit found that imposing prejudgment interest on the States as a result of a violation of the Food Stamp Act was a violation of the principles in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981). *State of Texas*, 951 F.2d at 651. Petitioners maintain nonetheless that this was error, that *Gallegos v. Lyng*, *supra*, was correctly decided, that enactment of the Debt Collection Act did not abrogate the common law remedy of prejudgment interest against States, and that the United States retains, pursuant to *Bell v. New Jersey*, 461 U.S. 773, 103 S.Ct. 2187 (1983), all implied remedies as part of the "backdrop" against which the States contracted for the Food Stamp Program. Petitioners' Brief at 29-31.

Respondents do not dispute that as a general rule the Federal Courts have the power to award appropriate relief for the violation of federal statutes, *Franklin v. Gwinnett County Public Schools*, __ U.S. __, 112 S.Ct. 1028, 1035 (1992), and that prior federal common law did provide for prejudgment interest against the States in certain circumstances. *West*

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[10] If the imposition of a monetary claim against the State based upon the intentional acts of third parties and the unilateral and non-reviewable fiat of the Secretary is *not* a penalty, then Respondents are hard-pressed to conceive what sort of claim *would* be a penalty.

Virginia, 479 U.S. at 312, 107 S.Ct. at 707. The applicability of *Gwinnett County* and *West Virginia* to the case *sub judice* is limited because of the punitive, non-contractual nature of the liability, the fact that the violation resulting in the assessment of the penalty was unintentional, and that the Debt Collection Act abrogated any prior common law exposing the States to prejudgment interest.

The Secretary's unilateral actions denied Texas the ability to "voluntarily and knowingly accept[] the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17, 101 S.Ct. at 1540. *State of Texas*, 951 F.2d at 651; *Perales v. United States*, 598 F.Supp. 19 (S.D.N.Y. 1984), *aff'd*, 751 F.2d 95 (2nd Cir. 1984)(per curiam); *State of Arkansas by Scott v. Block*, 825 F.2d 1254, 1258 n.7 (8th Cir. 1987), *reh'g and reh'g en banc denied*; *Commonwealth of Penn.*, 781 F.2d at 342 n.13. Because the Food Stamp Act does not expressly provide for this liability, the Fifth Circuit found that any such additional unbargained-for liability would not conform to the contractual nature of Spending Clause statutes such as the Food Stamp Act. *State of Texas*, 951 F.2d at 651.

The *Gallegos* Court, however, held that the imposition of prejudgment interest was not a new condition or obligation of program participation, but simply a "remed[y] available against a noncomplying State." *Gallegos v. Lyng*, 891 F.2d at 800, quoting *Bell v. New Jersey*, 461 U.S. 773, 103 S.Ct. 2187 (1983). The *Gallegos* Court, relying further on *West Virginia*, *supra*, applied a commercial debt analogy to this unilateral imposition of liability and interest, and determined that prejudgment interest was an "element of compensation" that was "commonly awarded to the nonbreaching party." *Gallegos v. Lyng*, 891 F.2d at 800. The reasoning of the *Gallegos* Court is wrong for several reasons.

First, this Court's holding in *West Virginia* is inapposite to the case at bar because, contrary to the situation in that case, the contract in effect between the State of Texas and the U.S. Department of Agriculture when the liabilities at issue were created was entered into after October 25, 1982, and consequently is subject to the Debt Collection Act. Second, the

enactment of the Debt Collection Act abrogated the prior common law remedy of prejudgment interest discussed in *West Virginia*. Third, Congress expressly enumerated the remedies available to the United States in the Debt Collection Act, thereby removing the presumption of all available remedies. *Gwinnett County*, __ U.S. at __, 112 S.Ct. at 1035-36 n.6. Fourth, as discussed in Section II, *supra*, the liability for direct mail delivery losses is punitive in character; punitive damages are not an element of complete compensation, and are not required to make a party whole. The *Gallegos* Court's reliance on *Riles v. Bennett*, *supra*, is misplaced for this very reason; *Riles* is an instance of misuse of federal program monies, and hence prejudgment interest is a proper element of full compensation.

Moreover, the imposition of implied remedies is limited by *Pennhurst* where the alleged violation is unintentional. *Pennhurst*, 451 U.S. at 28-29, 101 S.Ct. at 1545-46. "The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." *Gwinnett County*, __ U.S. at __, 112 S.Ct. at 1037. The strict liability imposed upon the State of Texas by the Secretary was for the actions of third parties over whom, as employees of the U.S. Postal Service, the State of Texas had no control. In sum, any unilateral imposition of punitive damages liability and concomitant prejudgment interest without judicial review must conflict with the holding in *Pennhurst* that implied remedies are limited under Spending Power statutes.

CONCLUSION

Respondents respectfully request that this Court affirm the appealed decision of the Court of Appeals for the Fifth Circuit.

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APPENDIX A

STATUTES AND REGULATIONS INVOLVED

1. 7 U.S.C. § 2016(f). State issuance liability.

Notwithstanding any other provision of this chapter, the State agency shall be strictly liable to the Secretary for any financial losses involved in the acceptance, storage and issuance of coupons,..., except that in the case of losses resulting from the issuance and replacement of authorizations for coupons and allotments which are sent through the mail, the State agency shall be liable to the Secretary to the extent prescribed in the regulations promulgated by the Secretary.

2. 7 C.F.R. § 276.1 Responsibilities and Rights.

(a) Responsibilities. (1) State agencies shall be responsible for establishing and maintaining secure control over coupons and cash for which the regulations designate them accountable. Except as otherwise provided in these regulations, any shortages or losses of coupons and cash shall strictly be a State agency liability and the State agency shall pay to FNS, upon demand, the amount of the lost or stolen coupons or cash, regardless of the circumstances.

3. 7 C.F.R. § 276.2 State agency liabilities.

(a) General provisions. Notwithstanding any other provision of this subchapter, State agencies shall be responsible to FNS for any financial losses involved in the acceptance, storage and issuance of coupons. ..State agencies shall pay to FNS, upon demand, the amount of any such losses.

(b)(4) A State agency shall be held strictly liable for mail issuance losses that are in excess of the tolerance level that corresponds to the preselected reporting unit.

31 U.S.C.:

§ 3701. Definitions and application

* * * * *

(c) In sections 3716 and 3717 of this title, "person" does not include an agency of the United States Government, of a State government, or of a unit of general local government.

* * * * *

§ 3714. Keeping money due States in default

The Secretary of the Treasury shall keep the necessary amount of money the United States Government owes a State when the State defaults in paying principal or interest on investments in stocks or bonds the State issues or guarantees and that the Government holds in trust. The money shall be used to pay the principal or interest or reimburse, with interest, money the Government advanced for interest due on the stocks or bonds.

* * * * *

§ 3716 Administrative Offset

(a) After trying to collect a claim from a person under section 3711(a) of this title, the head of an executive or legislative agency may collect the claim by administrative offset. The head of the agency may collect by administrative offset only after giving the debtor—

(1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;

(2) an opportunity to inspect and copy the records of the agency related to the claim;

(3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

(b) Before collecting a claim by administrative offset under subsection (a) of this section, the head of an executive or legislative agency must prescribe regulations on collecting by administrative offset based on—

(1) the best interests of the United States Government;

(2) the likelihood of collecting a claim by administrative offset; and

(3) for collecting a claim by administrative offset after the 6-year period for bringing a civil action on a claim under section 2415 of title 28 has expired, the cost effectiveness of leaving a claim unresolved for more than 6 years.

(c) This section does not apply—

(1) to a claim under this subchapter that has been outstanding for more than 10 years; or

(2) when a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved.

§ 3717. Interest and penalty on claims

(a) (1) The head of an executive or legislative

agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person that is equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point. The Secretary of the Treasury shall publish the rate before November 1 of that year. The rate is effective on the first day of the next calendar quarter.

(2) The Secretary may change the rate of interest for a calendar quarter if the average investment rate for the 12-month period ending at the close of the prior calendar quarter, rounded to the nearest whole percentage point, is more or less than the existing published rate by 2 percentage points.

(b) Interest under subsection (a) of this section accrues from the date—

(1) on which notice is mailed after October 25, 1982, if notice was first mailed before October 25, 1982; or

(2) notice of the amount due is first mailed to the debtor at the most current address of the debtor available to the head of the executive or legislative agency, if notice is first mailed after October 24, 1982.

(c) The rate of interest charged under subsection (a) of this section—

(1) is the rate in effect on the date from which interest begins to accrue under subsection (b) of this section; and

(2) remains fixed at that rate for the duration of the indebtedness.

(d) Interest under subsection (a) of this section may not be charged if the amount due on the claim is paid within 30 days after the date from which interest accrues under subsection (b) of this section. The head of an executive or legislative agency may extend the 30-day period.

(e) The head of an executive or legislative agency shall assess on a claim owed by a person—

(1) a charge to cover the cost of processing and handling a delinquent claim; and

(2) a penalty charge of not more than 6 percent a year for failure to pay a part of a debt more than 90 days past due.

(f) Interest under subsection (a) of this section does not accrue on a charge assessed under subsection (e) of this section.

(g) This section does not apply—

(1) if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges; and

(2) to a claim under a contract executed before October 25, 1982, that is in effect on October 25, 1982.

(h) In conformity with standards prescribed jointly by the Attorney General and the Comptroller General, the head of an executive or legislative agency may prescribe regulations identifying circumstances appropriate to waiving collection of interest and charges under subsections (a) and (e) of this section. A waiver under the regulations is deemed to be compliance with this section.